

This Opinion is Not a  
Precedent of the TTAB

Mailed: August 5, 2022

UNITED STATES PATENT AND TRADEMARK OFFICE

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Trademark Trial and Appeal Board

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*In re Brumis Imports, Inc.*

—  
Serial No. 90174988

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Douglas A. Miro of Amster Rothstein & Ebenstein LLP.

John Schmidt, Trademark Examining Attorney, Law Office 119,  
Brett J. Golden, Managing Attorney.

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Before Cataldo, Shaw and English,  
Administrative Trademark Judges.

Opinion by Cataldo, Administrative Trademark Judge:

Applicant, Brumis Imports, Inc., seeks registration on the Principal Register of  
the proposed mark KTCHN. (in standard characters), identifying the following goods:

metal kitchen knives, table forks, disposable plastic table cutlery; table  
knives made with stainless steel, ceramics or combinations thereof  
having plastic and rubber handles with and without securing strips, all  
primarily marketed and sold to retail stores or businesses; knives with  
sheaths; knife blocks with knife sets in International Class 8; and

cookware, namely, nonstick aluminum frying pans, nonstick aluminum  
sauté pans, nonstick aluminum Dutch ovens, nonstick aluminum  
saucepans, nonstick aluminum woks, carbon steel cake pans, carbon  
steel sheet pans, carbon steel muffin pans, carbon steel pizza pans,  
carbon steel loaf pans, mini carbon steel pans; food preparation goods,  
namely, poly boards, bamboo boards, plastic cutting mats and sheets

and food storage goods, namely, mixing bowls with lids, meal preparation goods in the nature of plastic, silicone and stainless steel utensils and tool sets for cooking and baking tasks, food storage containers in the nature of plastic storage containers for domestic use, condiment containers in the nature of plastic storage containers for domestic use; kitchen tools, namely, spatulas, turners, spreaders, spoons, basting brushes, ladles, kitchen gadgets, namely, peelers, tongs, whisks, graters, zesters, juicers, can openers, pizza wheel, and cutting boards; kitchen, food preparation, and cooking items, namely, cooking spoons, all, unless otherwise identified, made out of bamboo, plastic, cast iron, metal, rubber, silicone and other materials; housewares, namely, bowls, plates, serving forks, serving spoons, serving ladles, pot and pan scrapers, rolling pins, spatulas, coasters not made of paper and not being table linen, utensil holders, spoon rests, napkin holders and napkin rings, condiment cups for holding condiments and serving trays, all made in whole or in significant part of renewable and or sustainable materials and resources and bamboo in International Class 21.<sup>1</sup>

The Trademark Examining Attorney refused registration of Applicant's proposed mark under Section 2(e)(1) of the Trademark Act, 15 U.S.C. § 1052(e)(1), on the ground that the proposed mark is merely descriptive of both classes of goods identified in the application.

When the Examining Attorney made the refusal final, Applicant appealed and requested reconsideration, which was denied. Applicant and the Examining Attorney have filed briefs. We affirm the refusal to register.

### **I. Issue on Appeal**

The issue on appeal is whether the proposed KTCHN. mark "when used on or in connection with the goods of the applicant is merely descriptive ... of them" under

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<sup>1</sup> Application Serial No. 90174988 was filed on September 11, 2020 under Section 1(b) of the Trademark Act, 15 U.S.C. § 1051(b), based on Applicant's assertion of a bona fide intent to use the mark in commerce.

Serial No. 90174988

Section 2(e)(1) of the Trademark Act; 15 U.S.C. § 1052(e)(1).<sup>2</sup> *In re Bayer AG*, 488 F.3d 960, 82 USPQ2d 1828, 1831 (Fed. Cir. 2007).

### **Analysis of Refusal**

Section 2(e)(1) of the Trademark Act prohibits registration on the Principal Register of “a mark which, (1) when used on or in connection with the goods of the applicant is merely descriptive . . . of them.” 15 U.S.C. § 1052(e)(1).

“A mark is ‘merely descriptive’ within the meaning of Section 2(e)(1) ‘if it immediately conveys information concerning a feature, quality, or characteristic of the goods or services for which registration is sought.’” *In re Omniome, Inc.*, 2020 USPQ2d 3222, at \*3 (TTAB 2020) (quoting *In re N.C. Lottery*, 866 F.3d 1363, 123 USPQ2d 1707, 1709 (Fed. Cir. 2017)). To be merely descriptive, a mark must forthwith convey such information with a “degree of particularity.” *Goodyear Tire & Rubber Co. v. Cont’l Gen. Tire, Inc.*, 70 USPQ2d 1067, 1069 (TTAB 2008) (citing *In re TMS Corp. of the Ams.*, 200 USPQ 57, 59 (TTAB 1978) and *In re Entenmann’s, Inc.*, 15 USPQ 2d 1750, 1751 (TTAB 1990), *aff’d*, 90-1495 (Fed. Cir. Feb. 13, 1991)). “A mark need not recite each feature of the relevant goods or services in detail to be descriptive, it need only describe a single feature or attribute.” *Omniome*, 2020 USPQ2d 3222, at \*3 (quoting *In re Chamber of Commerce of the U.S.*, 675 F.3d 1297, 102 USPQ2d 1217, 1219 (Fed. Cir. 2012)).

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<sup>2</sup> The questions of whether Applicant’s proposed mark has acquired distinctiveness under Section 2(f), or is generic, are not before us.

The descriptiveness of a mark must be determined in the context of the goods or services identified in the application. *See Octocom Sys. Inc. v. Hous. Comput. Servs. Inc.*, 918 F.2d 937, 16 USPQ2d 1783, 1787-88 (Fed. Cir. 1990); *In re Vehicle Identification Network, Inc.*, 32 USPQ2d 1542, 1544 (TTAB 1994). Whether a mark is merely descriptive is “evaluated ‘in relation to the particular goods for which registration is sought, the context in which it is being used, and the possible significance that the term would have to the average purchaser of the goods because of the manner of its use or intended use,’” *Chamber of Commerce*, 102 USPQ2d at 1219 (quoting *Bayer*, 82 USPQ2d at 1831), and “not in the abstract or on the basis of guesswork.” *In re Fat Boys Water Sports LLC*, 118 USPQ2d 1511, 1513 (TTAB 2016) (citing *In re Abcor Dev. Corp.*, 588 F.2d 811, 200 USPQ 215, 218 (CCPA 1978)).

The merely descriptive refusal does not require that the mark is merely descriptive as applied to every item listed in each class; it is sufficient if the mark is merely descriptive of any of the goods or services identified in a single class to affirm the refusal as to that class. *In re Positec Grp. Ltd.*, 108 USPQ2d 1161, 1171 (TTAB 2013) (“[I]f the mark is descriptive of some identified items – or even just one – the whole class of goods still may be refused by the examiner.”); *In re Analog Devices Inc.*, 6 USPQ2d 1808 (TTAB 1988) (“[I]t is a well settled legal principle that where a mark may be merely descriptive of one or more items of goods in an application but may be suggestive or even arbitrary as applied to other items, registration is properly refused if the subject matter for registration is descriptive of any of the goods for which

registration is sought”), *aff’d without pub. op.*, 871 F.2d 1097, 10 USPQ2d 1879 (Fed. Cir. 1989).

We ask “whether someone who knows what the goods and services are will understand the mark to convey information about them.” *Real Foods Pty Ltd. v. Frito-Lay N. Am., Inc.*, 906 F.3d 965, 128 USPQ2d 1370, 1374 (Fed. Cir. 2018) (quoting *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (internal quotation omitted)). A mark is suggestive rather than merely descriptive if it requires imagination, thought, and perception on the part of someone who knows what the goods or services are to reach a conclusion about their nature from the mark. *See, e.g., Fat Boys*, 118 USPQ2d at 1515.

Applicant’s proposed mark consists of the term “KTCHN.”. “Evidence of the public’s understanding of [a] term . . . may be obtained from any competent source, such as purchaser testimony, consumer surveys, listings in dictionaries, trade journals, newspapers and other publications.” *Real Foods*, 128 USPQ2d at 1374 (quoting *Royal Crown Co. v. Coca-Cola Co.*, 892 F.3d 1358, 127 USPQ2d 1041, 1046 (Fed. Cir. 2018)). “These sources may include [w]ebsites, publications and use ‘in labels, packages, or in advertising material directed to the goods.’” *N.C. Lottery*, 123 USPQ2d at 1710 (quoting *Abcor Dev.*, 200 USPQ at 218).

“It is the Examining Attorney’s burden to show, *prima facie*, that a mark is merely descriptive of an applicant’s goods or services.” *Fat Boys*, 118 USPQ2d at 1513 (citing *In re Gyulay*, 820 F.2d 1216, 3 USPQ2d 1009, 1010 (Fed. Cir. 1987)). “If such a showing is made, the burden of rebuttal shifts to the applicant.” *Id.* (citing *In re Pacer*

*Tech.*, 338 F.3d 1348, 67 USPQ2d 1629, 1632 (Fed. Cir. 2003)). “The Board resolves doubts as to the mere descriptiveness of a mark in favor of the applicant.” *Id.* (citing *In re Stroh Brewery Co.*, 34 USPQ2d 1796, 1797 (TTAB 1994)).

## II. Evidence<sup>3</sup>

In support of the refusal of registration, the Examining Attorney introduced into the record the following dictionary definitions reflecting the common usage of the term “kitchen” – “a place (such as a room) with cooking facilities; the personnel that prepares, cooks, and serves food;”<sup>4</sup> and “a room or place equipped for cooking.”<sup>5</sup>

The Examining Attorney further introduced screenshots from the following websites, showing use of the term K(I)TCHN as a substitute term for “kitchen.”<sup>6</sup>

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<sup>3</sup> References to the application are to the downloadable .pdf version of documents available from the TSDR (Trademark Status and Document Retrieval) database. The TTABVUE citations refer to the Board’s electronic docket, with the first number referring to the docket entry and the second number, if applicable, referring to the page within the entry.

<sup>4</sup> January 28, 2021 First Office Action at 5, merriam-webster.com, accessed on January 28, 2021.

<sup>5</sup> June 7, 2021 Final Office Action at 7.

<sup>6</sup> June 7, 2021 Final Office Action at 13-41; January 3, 2022 Denial of Request for Reconsideration at 3-21.

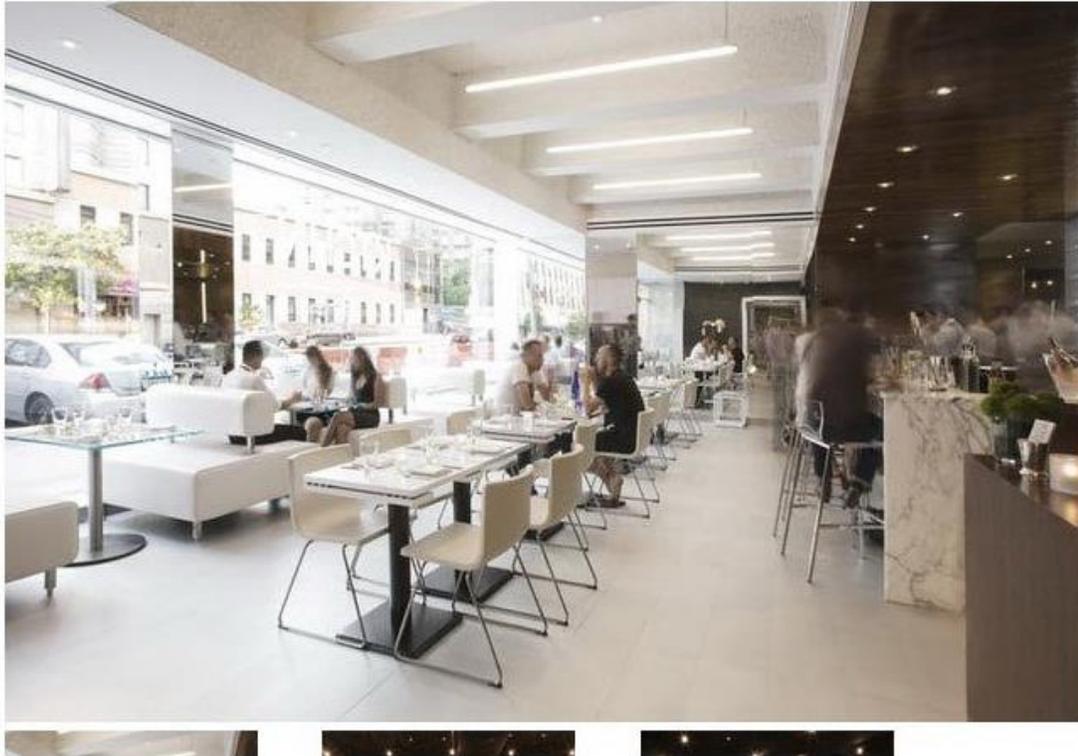
The first screenshots, from Gothamist.com, discuss a restaurant in New York City:

**FOOD**

# Check Out KTCHN, The Out Hotel's Tasty New RSTRNT

BY JOHN DEL SIGNORE

AUG 9, 2012 7:03 PM • UPDATED: AUG 9, 2012 9:24 PM • 9 COMMENTS • 3 PHOTOS





[VIEW ALL](#)  
3

If you can get past that irritating name, a rather beguiling restaurant awaits on the ground floor of [the fabulous Out NYC](#), a straight-friendly gay hotel that opened in March, just west of Times Square. [KTCHN](#), we're told, is a nod to contemporary text messaging linguistics, where words are often degraded into inscrutable acronyms or harried vowel-free neologisms, like "lol wtf the rstrnt's called ktchn?!" But hey, what's in a name (pronounced "kitchen," obvs)—the food's vry tsty.

The menu, which the hotel aptly describes as "refined comfort food," is the creation of Executive Chef Dale Schnell, who was previously running the kitchen at the Setai Fifth Avenue. It's served in two distinct areas—a bright and mod cafe that looks onto 42nd Street through floor-to-ceiling glass windows, and a more formal but still relaxed dining room behind the bar. Last night we were invited on a press tour of the hotel, which is wonderfully designed—like the [Standard Miami](#), it's refurbished from an old motor lodge, and features several interior, open-air courtyards for guests to mingle. Some of the rooms have their own private courtyards, and you can also book a communal room with a group of friends (or strangers!) for \$99 per person, per night.

After the tour, Schnell sent out a variety of selections from the appetizer menu. Highlights, of which there were many, included the highly addictive Sexy Fries, made with Salt & Vinegar, Smoked Paprika, and Garlic (\$6); the Spicy Tempura Green Beans (\$6); and the incredible West Coast Oysters, each one prepared with a Warm Leek Fondue, Basil Caviar, and Champagne Sauce (\$14). We also highly recommend the fresh Baby Arugula Salad, with Pickled Watermelon, Feta, Watermelon Radish, and 20 year Sherry Vinegar (\$11). An entree of

The second screenshots, from NewlyLA.blogspot.com, discuss a restaurant in Los Angeles;

MONDAY, FEBRUARY 6, 2012

## *Ktchn 105*

Whew, last week a busy one. Lots of work to be done! But after a short trip up to [Santa Barbara](#) on Saturday and an awesome Superbowl party at our friends' house on Sunday, I'm back to feeling like Ashley, *human*, rather than Ashley, *litigation associate*.

Anyway, we've got a lot to catch up on, at least in the food world! Thanks to my friend, [Stefanie](#), I discovered *another* great brunch place! (This city is full of 'em, I swear.) This one is [Ktchn 105](#). Have you heard of it? Maybe you have, but have you been able to *find it*? That is a totally different question.

And the inside is pretty cool too. It's got that industrial vibe that makes you think, *man, I want a chalkboard wall in my kitchen*. (Just me?) The kitchen is open to the entire space, and so is the bar. There is something comforting about seeing someone prepare the food you're about to ~~stuff~~ *in-your-mouth* eat. And they have cooking classes here (*because it's so cool*), so the open-kitchen thing makes sense.



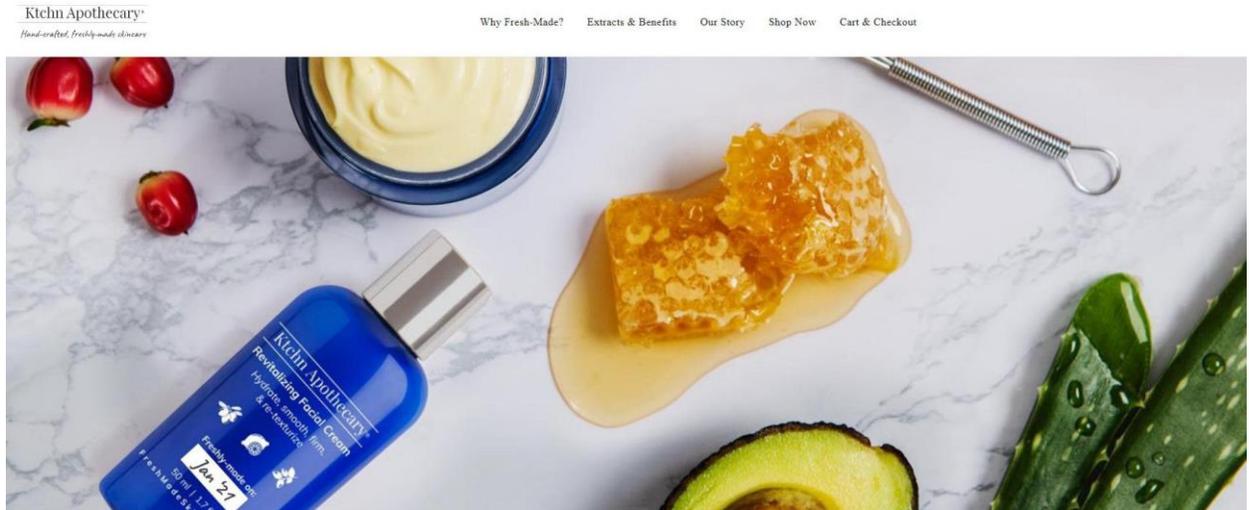
Ktchn 105 is both too cool for vowels and too cool for signs. And I love that about it. Say what you will, but I'm easily impressed by anything remotely *secret*, *hidden*, or *underground*. Marketing ploy or not, it totally works on me. So obvi, the yelp reviews had me at "unmarked."

So. You arrive in a warehouse district just east of downtown. It's not exactly shady, but it's not exactly *un*-shady. You park on the street and start searching for address numbers. Good luck. I just hope you find the random apartment building with the gated parking lot and the Ktchn 105 sign stuck to it. Maybe you should plan for a few extra minutes of searching time. Ha.

And the inside is pretty cool too. It's got that industrial vibe that makes you think, *man, I want a chalkboard wall in my kitchen.* (Just me?) The kitchen is open to the entire space, and so is the bar. There is something comforting about seeing someone prepare the food you're about to ~~stuff~~ in-your-mouth eat. And they have cooking classes here (*because it's so cool*), so the open-kitchen thing makes sense.

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The third screenshots, from KtchnApothecary.com, discuss various skincare products:



A: Both! We believe everyone deserves access to clean, clutter-free skincare & healthier-looking skin that glows.

**Q: Is Ktchn Apothecary natural skincare Gluten-Free?**

A: Yes! As with most food-grade products, there may be trace amounts of Gluten in the facilities that process our extracts. However **none** of our extracts contain Gluten -- and our Colloidal Oats are naturally Gluten Free.

<http://www.cureceliacdisease.org/faq/do-oats-contain-gluten/>

**Q: Should I use the Ktchn Apothecary Revitalizing Facial Cream as an AM or PM Facial Cream?**

A: We suggest both in the morning and evening. If applying makeup or sunblock, wait 3-5 minutes for the facial cream to fully absorb.

**Q: What is the PH of your skincare?**

A: Our skincare PH is right around the optimal 5.5 level which is known to improve skin complexion.

**Q: Is there sunblock or SPF in the Ktchn Apothecary Revitalizing Facial Cream?**

A: While many of the extracts in our formula offer mild SPF protection, when in direct sun, we recommend applying a light-weight, high SPF on top of the Ktchn Apothecary Revitalizing Facial Cream.

**Q: Why do you use Cold-Pressed oils in your formulas?**

A: There are 2 ways to extract oil from their source: Chemically or by physically pressing. The chemical way uses ingredients like Hexane to separate the oil from its source. The second way is to Cold-Press or squeeze the oil out of its source (like stomping grapes to make wine). We don't like using unnecessary chemicals so we use cold-pressed oils in our natural, fresh-made formulas.

**Q: Do your formulas contain Organic and non-GMO extracts?**

A: Yes! We use Organic and non-GMO extracts in our natural, fresh-made skincare whenever possible.

The fourth screenshots, from TheMellowKitchn.com, discuss various recipes:

The screenshot shows the homepage of 'The Mellow Kitchn'. The logo is in the top left, and the navigation menu includes 'HOME', 'RECIPES', 'THINKING OUT LOUD', and 'ABOUT'. A central modal window asks 'Are you hungry yet?' and offers a monthly newsletter. Below the modal are three recipe cards: 'ROASTED POTATO CUCUMBER SALAD', 'ELDERFLOWER BUNDT CAKE', and 'BAKED FETA & ASPARAGUS PASTA'.

**THE Mellow KITCHN**  
EST. 2015

[HOME](#) [RECIPES](#) [THINKING OUT LOUD](#) [ABOUT](#)

**Are you hungry yet?**

Let's keep in touch with my monthly newsletter, where I share seasonal recipes & tips on living mindfully!

**Email**

[Sign me up!](#)

We will use your data for this newsletter only! And you can unsubscribe anytime with just one click.

**ROASTED POTATO CUCUMBER SALAD**

**ELDERFLOWER BUNDT CAKE**

**BAKED FETA & ASPARAGUS PASTA**

HEAD TO THE RECIPE

## WEEKNIGHT PEAS



We will use your data for this newsletter only! And you can unsubscribe anytime with just one click.

everything fit into your day? Work, school, friends, sports, social media... the privilege of having all the opportunities we have comes with the price of having less to almost no time. While I, for my part, have been working on slowing down and concentrating on the important things in life, I still do know those days, when time just keeps slipping through your fingers and all you can spare for

cooking ...

HEAD TO THE RECIPE

We will use your data for this newsletter only! And you can unsubscribe anytime with just one click.

of mine! In this space you find wholesome vegetarian recipes for the whole family. With my recipes I'd love to show you how easy it is to care for you and the planet's health and wellness while cooking delicious, no-fuss recipes. I love to hear from you, so if you like leave me a comment in the comment section or follow me on Instagram!

Lots of love, Anna

KEEP ON SEARCHING...

Search this website ... SEARCH

@THEMELLOWKITCHN ON IG



The fifth screenshots, from KtchnDTLA.com, discuss another restaurant in Los Angeles: and

HOME PRESS MEDIA



KTCHN LA GALLERY CONTACT

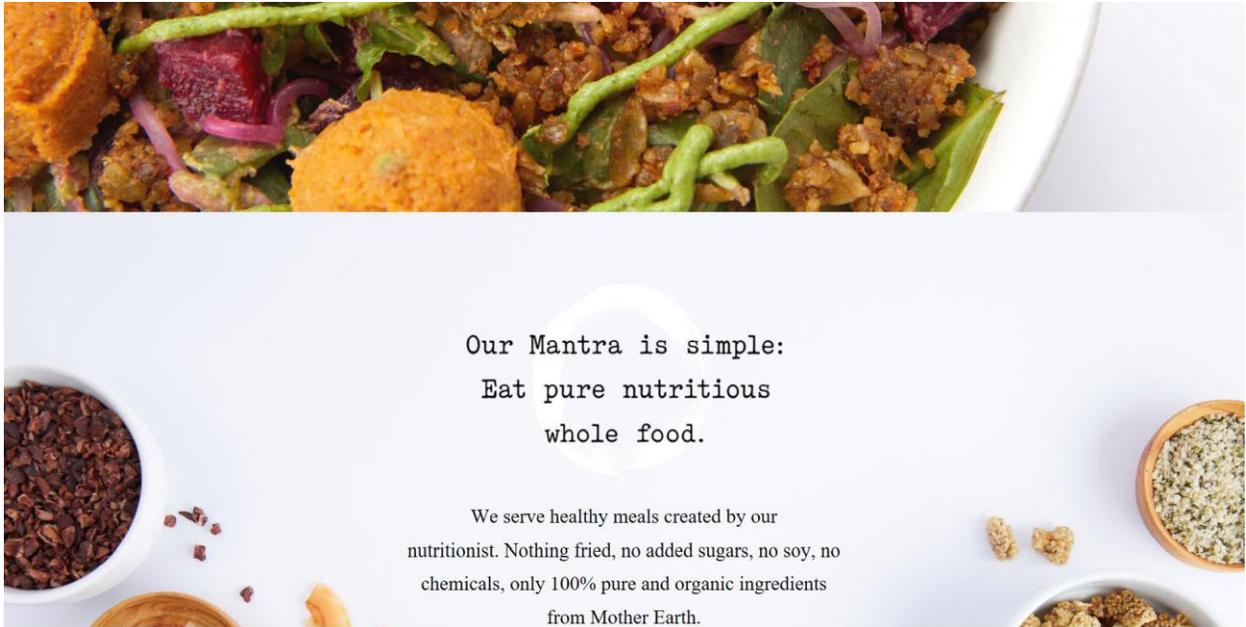
WE'RE OPEN





The sixth screenshots, from PureKtchn.com, discuss another restaurant in New York City:





The Examining Attorney further introduced into the record screenshots from the websites [CrateAndBarrel.com](http://CrateAndBarrel.com), [SurLaTable.com](http://SurLaTable.com) and [EverythingKitchens.com](http://EverythingKitchens.com),<sup>7</sup> in support of his argument that “kitchen goods are many of the goods applicant identifies such as knives, cookware and related goods.”<sup>8</sup> These three websites display various “kitchen tools and accessories,” “cookware,” “knives,” and other kitchen “utensils and gadgets” of the type identified in both classes of the involved application.

We find this evidence to be probative of the issue of mere descriptiveness in this case. The Federal Circuit has approved the use of internet evidence in *ex parte* proceedings. *See, e.g., Bayer*, 82 USPQ2d at 1833 (“Internet evidence is generally admissible and may be considered for purposes of evaluating a trademark”) (citations

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<sup>7</sup> June 7, 2021 Final Office Action at 42-77.

<sup>8</sup> *Id.* at 4.

omitted); *see also Real Foods*, 128 USPQ2d at 1374 (evidence of public's understanding of a term may include dictionary definitions).

### III. Discussion

The Examining Attorney's evidence, excerpted above, consists of five uses of the term KTCHN in webpages discussing four restaurants and one apothecary featuring organic skincare products. A sixth website incorporates the term KITCHN to discuss cooking recipes. This evidence shows use of the term KTCHN as an abbreviated or "disemvoweled" alternate spelling of "kitchen" as part of a name for restaurants and skincare products. We hereby take judicial notice of the following definition of "dismevowel" – "*informal* to remove the vowels from (a word in a text message, email, etc.) in order to abbreviate it."<sup>9</sup> The evidence of record establishes that Applicant's proposed KTCHN. mark is the term "kitchen" minus the vowels.

The novel spelling of a mark that is the phonetic equivalent of a merely descriptive word or term is also merely descriptive if purchasers would perceive the different spelling as the equivalent of the descriptive word or term. *See In re Hercules Fasteners, Inc.*, 203 F.2d 753, 97 USPQ 355 (CCPA 1953) (holding "FASTIE," phonetic spelling of "fast tie," merely descriptive of tube sealing machines); *In re Carlson*, 91 USPQ2d 1198 (TTAB 2009) (holding "URBANHOUSING" phonetic spelling of "urban" and "housing," merely descriptive of real estate services); *In re State Chem.*

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<sup>9</sup> Dictionary.com, retrieved from Collins English Dictionary (2012) on August 4, 2022. The Board may take judicial notice of definitions from dictionaries, including online dictionaries that exist in printed format. *E.g.*, *In re S. Malhotra & Co. AG*, 128 USPQ2d 1100, 1104 n.9 (TTAB 2018). We exercise so our discretion here.

*Mfg. Co.*, 225 USPQ 687 (TTAB 1985) (holding “FOM,” phonetic spelling of “foam,” merely descriptive of foam rug shampoo). The Examining Attorney’s evidence supports a finding that consumers view KTCHN. as the phonetic equivalent of “kitchen.”

Applicant’s addition of a period to the end of its KTCHN. mark does not create an additional, separate meaning apart from “kitchen.” The use of common punctuation in a mark generally is not sufficient to negate the mere descriptiveness of a term. *See, e.g., In re Vanilla Gorilla, L.P.*, 80 USPQ2d 1637, 1841 (TTAB 2006) (presence of hyphen in mark “3-0s” does not negate mere descriptiveness of the mark for automobile wheel rims); *In re Promo Ink*, 78 USPQ2d 1301, 1306 (TTAB 2006) (presence of exclamation point in “PARTY AT A DISCOUNT!” does not significantly change the commercial impression of the mark); *In re S.D. Fabrics, Inc.*, 223 USPQ 54, 55 (TTAB 1984) (presence of slash in the mark “designers/fabric” does not negate mere descriptiveness of mark).

As noted above, in determining whether a mark is merely descriptive, the Board must consider the mark in relation to the goods or services for which it is to be registered. “The question is not whether someone presented with only the mark could guess what the goods or services are. Rather, the question is whether someone who knows what the goods and services are will understand the mark to convey information about them.” *DuoProSS Meditech Corp. v. Inviro Med. Devices, Ltd.*, 695 F.3d 1247, 103 USPQ2d 1753, 1757 (Fed. Cir. 2012) (quoting *In re Tower Tech Inc.*, 64 USPQ2d 1314, 1316-17 (TTAB 2002)).

We agree with the Examining Attorney that Applicant's goods, as identified, may broadly be described as "kitchen goods." Indeed, in its appeal brief, Applicant identifies its goods as "kitchenware."<sup>10</sup> Applicant's Class 8 goods include "metal kitchen knives" and its Class 21 goods include various enumerated "kitchen tools," "kitchen gadgets" and "kitchen food preparation and cooking items." "A written application must specify the particular goods and/or services on or in connection with which the applicant uses, or has a bona fide intention to use, the mark in commerce. 15 U.S.C. § 1051(a)(2), (b)(2); 37 C.F.R. § 2.32(a)(6). To 'specify' means to name in an explicit manner. The identification should set forth common names, using terminology that is generally understood." Trademark Manual of Examining Procedure § 1402.01 (July 2022). Applicant has identified goods in both classes as "kitchen" goods, using their generally understood, common names.

Use of a term in the identification of goods also serves as evidence that the term is merely descriptive. *See, e.g., In re Taylor & Francis (Publishers) Inc.*, 55 USPQ2d 1213, 1215 (TTAB 2000) ("Applicant's identification of goods expressly states that the series of non-fiction books upon which applicant uses its mark are 'in the field of psychology.' The word PSYCHOLOGY therefore is merely descriptive of the subject matter of applicant's books, as identified in the application ..."). Applicant's proposed KTCHN. mark is the equivalent of "kitchen," and Applicant itself uses that term to identify certain of its goods in both classes.

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<sup>10</sup> 6 TTABVUE 6.

Registration may be refused if the proposed mark is merely descriptive of any of the goods or services in each International Class identified in the application. *In re Stereotaxis, Inc.*, 429 F.3d 1039, 77 USPQ2d 1087, 1089 (Fed. Cir. 2005). KTCHN. thus, merely describes Applicant's goods.

Applicant argues: "There is no evidence that consumers are likely to view KTCHN. as "kitchen." Applicant's Mark is missing all the vowels, and also ends with a period. If anything, the period at the end of the word will lead consumers to think KTCHN. is short for a much longer word."<sup>11</sup> To the contrary, the above evidence shows that consumers will view KTCHN. as "kitchen." Applicant has introduced no evidence to support its contention that the period at the end of KTCHN. will lead consumers to believe it denotes "a much longer word."

Applicant further argues that its proposed mark is a double entendre:

In particular, KTCHN. is likely to make consumers think of the term "kitsch" meaning "art or other objects that, generally speaking, appeal to popular rather than 'high art' tastes" (see <https://en.wikipedia.org/wiki/Kitsch>, copy attached as Exhibit A to Applicant's May 17, 2021 Response to Office Action). Consumers may well think Applicant's Mark, KTCHN., is a play on that word, suggesting that its kitchenware rises to the level of art. Alternatively, consumers may associate Applicant's Mark KTCHN. with "bitchin," meaning excellent. See [www.merriam-webster.com/dictionary/bitchin%27](http://www.merriam-webster.com/dictionary/bitchin%27), copy attached as Exhibit A to Applicant's December 7, 2021 Request for Reconsideration.

Since Applicant's Mark has a second, suggestive meaning (and in fact, two suggestive meanings), the Mark is clearly not merely descriptive.<sup>12</sup>

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<sup>11</sup> 6 TTABVUE 5 (Applicant's brief).

<sup>12</sup> *Id.* at 6.

We find no evidence in the record that consumers will view KTCHN. as having several connotations in connection with Applicant's goods and services. *Cf. In re Colonial Stores Inc.*, 394 F.2d 549, 157 USPQ 382 (CCPA 1968); *In re Tea and Sympathy, Inc.*, 88 USPQ2d 1062 (TTAB 2008). Aside from defining "kitsch" and "bitchin," Applicant has introduced no evidence to support its speculative argument that consumers viewing its KTCHN. mark on or in connection with its goods will perceive the proposed mark as appealing to popular tastes or excellence. Nor does Applicant explain how removing the letter "T" from KITCHEN will make consumers think of the terms "kitsch" or "bitchin," which both retain the first letter "I." Applicant's "assertions are unsupported by sworn statements or other evidence, and 'attorney argument is no substitute for evidence.'" *In re OEP Enters., Inc.*, 2019 USPQ2d 309323, \*14 (TTAB 2019) (quoting *Cai v. Diamond Hong, Inc.*, 901 F.3d 1367, 127 USPQ2d 1797, 1799 (Fed. Cir. 2018) (internal quotation omitted)).

In addition, Applicant's argument "that no one else is using KTCHN. for Applicant's products bolsters the argument that its Mark is not merely descriptive"<sup>13</sup> is unpersuasive. It is well-established that simply because an applicant may be the first and only user of a term "does not render that term distinctive, if it otherwise meets the standard set forth in *In re Gyulay*, *In re Chamber of Commerce*, and *DuoProSS.*" *Fat Boys*, 118 USPQ2d at 1515; see also *In re Phoseon Tech., Inc.*, 103 USPQ2d 1822, 1826 (TTAB 2012). We also note the Examining Attorney's evidence

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<sup>13</sup> 6 TTABVUE 8.

of third-party use of KTCHN discussed above indicates that others are using the term in association with restaurant and food preparations services.

To the extent that Applicant has relied upon a variety of cases to bolster its contention that its proposed mark is not merely descriptive, as is often noted by the Board and the Courts, each case must be decided on its own merits. *See In re Nett Designs Inc.*, 236 F.3d 1339, 57 USPQ2d 1564, 1566 (Fed. Cir. 2001); *see also In re Kent-Gamebore Corp.*, 59 USPQ2d 1373 (TTAB 2001); *In re Wilson*, 57 USPQ2d 1863 (TTAB 2001). Herein, the record clearly establishes that KTCHN. merely describes a feature, quality, or characteristic of both classes of the identified goods.

#### **IV. Conclusion**

Based on the record before us, we find that the Examining Attorney has demonstrated that the proposed mark KTCHN. is merely descriptive of Applicant's identified kitchenware goods, and that Applicant has failed to rebut the Examining Attorney's *prima facie* case.

**Decision:** The refusal to register Applicant's mark under Section 2(e)(1) of the Trademark Act is affirmed.